STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM COURT OF APPEALS
Whitbeck, P.J., and Owens and Schuette, J.J.

SHERRY COMBEN, TREASURER FOR THE COUNTY OF ANTRIM,

Plaintiff-Appellee,

vs.

THE STATE OF MICHIGAN, JAY B. RISING, in his capacity as STATE TREASURER OF MICHIGAN, and THE MICHIGAN DEPARTMENT OF TREASURY,

Defendants-Appellants,

AND

PURE RESOURCES, L.P., a Texas limited partnership; DOMINION RESERVES, INC., a Virginia Corporation; WOLVERINE GAS & OIL COMPANY, INC., a Michigan Corporation; WARD HEIRS BEING: EUGENIE R. ANDERSON, STEPHEN WARD DEVINE, ELIZABETH PALMER, DEVINE WISEMAN, MICHAEL EDMUND DEVINE, SUZANNE LEE DEVINE, WILLIAM W. DUNN, DAVID W. FAY, EDWIN R. FAY, PETER W. FAY, ROBERT A. FAY, ROSAMOND S. FISHER, FREDERICK T. GOLDING, Successor Trustee under the Virginia W. Golding Trust Agreement dated August 30, 1989, NANCY HAMILTON, LISA MARRIOTT JONES, DAPHNE FAY LANDRY, GEORGE S. LEISURE, JR., PETER R. LEISURE, FLORA NINELLES, aka Flora Fay Ninelles, MARJORIE S. RICHARDSON, JAMES W. RILEY, JR., WILLIAM A. RILEY, BARBARA F. ROSENBERG, ELIZABETH R.P. SHAW, ANN WARD SPAETH, FREDERICK S. STRONG III, ROBERT A.W. STRONG, Revocable Trust u/a/d 4/17/02, EUGENIE S. KAUFFMANN, their heirs and assigns,

Defendants-Appellees.

Supreme Court No. 127212

Court of Appeals No. 248963

Antrim County Circuit Court
No. 02-7860-PS

DEFENDANT-APPELLEE, PURE RESOURCES L.P.'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

Dated: January 24, 2006

John J. Lynch (P16886)
Mary Ann J. O'Neil (P49063)
LYNCH, GALLAGHER, LYNCH,
MARTINEAU & HACKETT, P.L.L.C.
Attorneys for Pure Resources, L.P.
555 North Main, P.O. Box 446
Mt. Pleasant, MI 48804-0446
(989) 773-9961

ATTORNEYS OF RECORD

Mr. Charles H. Koop
Prosecuting Attorney
Attorney for Sherry Comben, Treasurer
for the County of Antrim
1905 Courthouse, 205 E. Cayuga Street
P.O. Box 280
Bellaire, MI 49615-0280
(231) 533-6860

John J. Lynch (P16886)
Mary Ann O'Neil (P49063)
LYNCH, GALLAGHER, LYNCH,
MARTINEAU & HACKETT, P.L.L.C.
Co-Counsel for Pure Resources, L.P.
555 North Main, P.O. Box 446
Mt. Pleasant, MI 48804-0446
(989) 773-9961

Paula K. Manis (P29995)
WORMAN, DIXON & MANIS, P.L.C.
Co-Counsel for Pure Resources, L.P.
2400 Lake Lansing Rd., Ste. E
Lansing, MI 48912
(517) 485-0400

Kevin T. Smith (P32825)
Assistant Attorney General
Attorneys for Jay B. Rising, in his capacity as
State Treasurer of Michigan and the Michigan
Department of Treasury, Revenue Division
G. Mennen Williams Building
525 W. Ottawa
Lansing, MI 48909
(517) 373-3203

Robert A.W. Strong
Robert A. W. Strong Revocable Trust
225 S. Old Woodward Street
Birmingham, MI 48009-6179

William D. Horn (P33855)
Mark A. Kehoe (P28629)
Claude L. Vander Ploeg (P21727)
MIKA, MEYERS, BECKETT & JONES, PLC
Attorneys for Dominion Reserves, Inc. and
Wolverine Gas & Oil Company, Inc.
900 Monroe Ave., N.W.
Grand Rapids, MI 49503
(661) 632-8000

Peter W. Steketee (P20967)
Attorney for Amici Curiae United Conservation
Clubs, et al.
660 Cascade W. Parkway, S.E.
Suite 65
Grand Rapids, MI 49546
(616) 949-6551

John G. Cameron, Jr. (P28751)
John J. Bursch (P57679)
Allison J. Mulder (P64796)
Jennifer B. Remondino (P68991)
WARNER NORCROSS & JUDD LLP
Attorneys for Amicus Curiae State Bar of
Michigan's Real Property Law Section
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503-2487
(616) 752-2000

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

STATUTES AND COURT RULES

CASES

BOOK AND LEGAL TREATISES

CONSTITUTIONS

STANDARD OF REVIEW

The matters before the Court involve questions of law; the standard of review is de novo.

COUNTER-STATEMENT OF QUESTIONS

Question No. 1: Does an owner's separately owned oil and gas rights transfer to the FGU with the surface rights when the surface owner forfeits his rights for failure to timely pay his real property taxes?

The trial court said:	No
The Court of Appeals says	No
Defendant-Appellee Pure Resources, L.P. says :	No
Defendant-Appellee Treasury Department says:	Yes

Question No. 2: Are oil and gas owned by someone other than the surface owner exempt from or specifically taxed in lieu of GPTA as amended by 1999 PA 123 because of the severance tax act of 1929?

The trial court said:	Yes
The Court of Appeals says:	Yes, exempt
Defendant-Appellee Pure Resources, L.P. says:	Yes
Defendant-Appellee Treasury Department says :	No

Question No. 3: Michigan's Dormant Mineral Act changed the common law by making severed oil and gas rights subject to abandonment unless the owner does specific acts within a 20-year period of time. Where the severed oil and gas owner fully performed those acts can his property rights be forfeited to the FGU because the surface owner's land was forfeited for his failure to pay taxes under the GPTA?

The trial court said:	No
The Court of Appeals says:	No
Pure, Defendant-Appellee says:	No
The Department of Treasury says:	Yes

Question 4: Do the state defendants have standing to prosecute this appeal?

The state Defendants say:	Yes
Pure, Defendant-Appellee says:	No

Question 5: Whether a lessee of mineral rights who has leased the rights from the surface estate owner is (a) entitled to notice in foreclosure proceedings under the GPTA, MCL 211.78k(5)(e), or (b) has a "severed" mineral interest that is unaffected by foreclosure proceedings involving the surface estate?

This question was raised by this court.

COUNTER-STATEMENT OF PROCEEDINGS BELOW

The proceedings before the trial court are best expressed in the concise statement of the Honorable Philip E. Rodgers, Jr. in the opening of his Opinion and Order of April 10, 2003,[1] paraphrased below:

With the enactment of 1999 PA 123 (MCL 211.78, et seq.) the Michigan Legislature made major revisions in the General Property Tax Act ("GPTA"), 1893 PA 206 (MCL 211.1, et seq.) whereby the statutory scheme for the collection of delinquent real property taxes was changed from a tax sale scheme to one of forfeiture and foreclosure. Pursuant to MCL 211.78(3) the Antrim County Board of Commissioners, with the concurrence of the County Treasurer, elected to have property foreclosed under 1999 PA 123 forfeited to the County Treasurer under Sec. 78g. Thus, the county became the "foreclosing governmental unit" ("FGU").

On April 3, 2001, the Plaintiff/Appellee Sherry Comben, Treasurer for the county of Antrim, (County) filed an action for foreclosure upon those parcels that had been forfeited, and where the taxes remained unpaid for the tax years 1997 and 1999. On March 1, 2002, the trial court entered an Order of Foreclosure as to 134 parcels for which taxes had remained unpaid. On June 24, 2002, the County brought a Declaratory Judgment action seeking a ruling on nine separate issues related to the foreclosure process.[2]

Defendant/Appellee Pure Resources L.P. ("Pure") filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), asking the Court to find that 1999 PA

---

[1] Appellants' Appendix, pgs 13a – 38a

[2] Complaint, Appellee Pure's Appendix, pgs 1b – 22b

123 is unconstitutional in that it violates the due process and taking clauses of both the Michigan and United States Constitutions. More specifically, Pure contended that 1999 PA 123, MCL 211.78 et seq., fails to provide the owners of a distinct, recorded interest in the subsurface estate with proper notice and an opportunity to be heard to contest the forfeiture proceedings. Pure alternatively contended that oil and gas interests are exempt from ad valorem property taxes because the severance tax on oil and gas when severed is "in lieu of any other taxes."

Defendants/Appellees Dominion Resources, Inc. ("Dominion") and Wolverine Oil & Gas Company, Inc. ("Wolverine") filed a motion for summary disposition pursuant to MCR 2.116(C)(8). These Defendants/Appellees want a ruling that the GPTA as amended does not apply to leases or the rights to develop and operate any lands of this state for oil and gas, the values created thereby and the property rights attached to or inherent therein because they are exempt by virtue of the severance tax act. These Defendants/Appellees alternatively seek a ruling from the Court that the GPTA, as amended, if applied to oil and gas interests violates the due process clauses of the Michigan and United States Constitutions.

The trial court held that the severance tax act, MCL 205.301 et seq., imposes a specific tax, not a general ad valorem property tax, in the nature of an excise tax, i.e., a tax on the performance of an act or enjoyment of a privilege.[3] The trial court directed attention to Sec. 15 of the severance tax act, MCL 205.315, which states, in part, that the severance tax shall be "*in lieu of all other taxes, state or local, upon the oil or gas,*

---

[3] Appellants' Appendix, pgs 13a – 38a

the property rights attached thereto or inherent therein, or the values created thereby; upon all leases or the rights to develop and operate any lands of this state for oil or gas." Sec. 15 goes on to state that nothing in the act shall exempt the machinery, appliances, pipelines, tanks or other equipment. (emphasis supplied)

The trial court further noted that Const, 1963, art. IX, § 3 while providing for the uniform general ad valorem taxation of real and tangible personal property "*not exempt by law*" also stated that the legislature could provide for *alternative means of taxation of designated real* and tangible personal *property "in lieu of general ad valorem taxation.*" (emphasis supplied)

The holding of the trial court could be said to take the taxation of oil and gas rights out of the purview of a general ad valorem tax either as an exception to the GPTA as amended or an alternative means of taxation, i.e., a specific tax independent of the GPTA as amended within the meaning of act.[4]

The trial court further held that under the GPTA before it was amended, the state acquired only a tax lien against the foreclosed property when it took the excess at sale. This lien matured into fee simple title after the expiration of all redemption periods.

Under the GPTA, *after* amended by the Act, fee simple title vested absolutely in the FGU without any rights of redemption if all forfeited delinquent taxes, interest, penalties and fees were NOT paid within 21 days after entry of judgment.

Because the legislature did not provide expressly that severed oil and gas interests would be extinguished by the new forfeiture and foreclosure proceeding, it must

---

[4] Const, 1963, art. IX, § 3

be concluded that the legislature never intended for severed oil and gas interest to be extinguished with the surface; and thus severed rights do not pass through the property tax reversion process.

The trial court also held that any interpretation of the GPTA, as amended, that includes interests in severed oil and gas rights conflicts with the dormant mineral act of 1963, MCL 554.291 et seq. The dormant mineral act says the owner of severed oil and gas interests who fully complies with the requirements of that act shall not have this interest abandoned. The state's interpretation of the GPTA, as amended, results in the owner of severed oil and gas losing his interest if the unrelated surface owner failed to pay taxes.

The trial court also discussed the constitutional issues raised in the briefs and it determined if the GPTA as amended were interpreted to extinguish severed oil and gas interests it would violate the due process provisions of both the state and federal constitutions. The remedy provisions of the GPTA, as amended by the Act, require the severed oil and gas owner to sue the FGU for the fair market value of its interests if it had no notice of proceeding to forfeit and foreclose. That could result in a multimillion dollar judgment against the FGU for a cheap lot.

The trial court held that under the Michigan and U.S. Constitutions prohibiting the taking of private property for public use without just compensation, the FGU could not take property without notice of hearing or redemption and force a citizen to sue the FGU, after the fact, for "just compensation." There is an essential nexus and a legitimate state interest in acquiring subdivision lots in Lakes of the North to restore parcels to the market so they can be once again taxed. There is no such nexus in seizing ownership

of the severed oil and gas interests within producing and operating gas fields and taxing a resort lot.

The trial court considered the equal protection clause of the U.S. Constitution and the Uniform Taxation Clause of the Michigan Constitution when it concluded the legislature intended to tax oil and gas by different rules when it enacted the severance tax.

The state appealed to the Court of Appeals which agreed with the trial court that the severance tax exempts all interests in oil and gas rights from the general ad valorem tax (GPTA, as amended by the Act) with its attendant liens and tax foreclosures of parcels where oil and gas interests have been previously severed.[5]

The Court of Appeals approved and adopted the trial court's discussion and holding of the conflict with the dormant mineral act and the state's interpretation of the GPTA, as amended.

The Court of Appeals avoided interpreting the GPTA, as amended, as unconstitutional. It ruled only on the express, clear terms of the severance tax act and its Sec. 15 as being an exception to the GPTA, as amended. It made no distinction between a specific tax on property interest or an exception to the GPTA. The decision of the trial court was affirmed.

The state then filed its Application for Leave to Appeal which was granted.

COUNTER-STATEMENT OF FACTS

Michigan had no commercial oil and gas industry until the 1925 discovery of oil in the Saginaw Field. The State Legislature passed the first laws regulating oil and gas in

---

[5] Appellants' Appendix, pgs 44a – 55a

1927; it passed the conservation acts in 1927 and 1929. The state gave its first oil and gas lease in 1927. The severance tax of 1929, MCL 205.301, was passed to be the exclusive tax for oil and gas. Conclusions of the state on taxation of oil and gas before it was recognized as a commercial resource in Michigan are irrelevant.

Pure objects to the state's reference to an action presently pending before the Antrim County Circuit Court.[6]

The *Black Stone* case is in mediation. No appeals have been taken by the state of any opinions or orders. The state attached two opinions and orders denying the state's motions for summary disposition to its brief for this Court's edification. The first order was handed down after the state's appeal to the Court of Appeals and the second order handed down a month before the state filed its brief to this Court.

These opinions are not part of this record and neither the trial court nor the Court of Appeals were given the state's selected facts, opinions of the trial court's rulings or the criticisms the state has shared with this Court. These actions are destructive of our judicial system, unfair to our trial judges who are shepherding cases through that system and violate the rules governing appellate practice.

Summary

This case involves about 100 resort lots which are underlain by gas fields and were forfeited to the County as FGU, under the GPTA as amended by 1999 PA 123, MCL 211.78 et seq.

---

[6] *Black Stone Minerals Co, LP v State of Michigan* consolidated as No. 03-7933-CZ

The oil and gas was severed when Defendant/Appellees, the Ward heirs sold the surface rights to about 8,000 acres to a developer and had one-half (½) the oil and gas rights reconveyed to them. The developer conveyed the other one-half (½) of the oil and gas rights to the predecessor of Pure.

The Ward heirs and Pure's predecessor gave Defendants/Appellees, Wolverine and then Dominion oil and gas leases on all or most of these rights. Three gas fields have been discovered and are producing under the leases.

The County (FGU) asks if the forfeiture and foreclosure of the surface lots gives the FGU fee simple absolute in the lots from the heavens to the center of the earth (including the separate severed oil and gas), or if the FGU received only the fee simple title of the surface owner who failed to pay the tax under GPTA, as amended by the Act.

LAW AND ARGUMENT

Question No. 1: Does an owner's separately owned oil and gas rights transfer to the FGU with the surface rights when the surface owner forfeits his rights for failure to timely pay his real property taxes?

Is the record title owner of subsurface oil and gas, both fungible liquids, which were severed from the fee simple absolute estate prior to any tax foreclosure proceedings, subject to forfeiture and foreclosure when the owner of a lot in the platted surface didn't pay his taxes?

If the ownership rights to oil and gas are not subject to foreclosure it is because (1) the GPTA as amended by the Act does not authorize such a tax on that type of property or; (2) the legislature has not imposed an ad valorem tax on oil and gas rights, but has imposed another type of tax, specific to that property or; (3) the persons or

property are exempt from taxation under the GPTA as amended by the Act; or (4) the property in question is not the type of "property" capable of assessment (which is a requirement for *ad valorem taxes*), and taxation under the GPTA, as amended by the Act, MCL 211.76.

The state says the GPTA, as amended by the Act is the only tax on severed oil and gas interests in real property. It is wrong.

The Constitution, 1963, art IX, § 3 permits a uniform general ad valorem tax of real and tangible personal property that is *not exempt by law.* The real and tangible personal property shall have its true cash value determined after which the property shall be uniformly assessed at no more than 50%. It goes on to state that the legislature may provide for an *alternative means of taxation* of designated real and personal property. A specific tax, in lieu of the general ad valorem tax, has to be uniform on the class on which it operates. (emphasis supplied)

Question No. 2: Are oil and gas owned by someone other than the surface owner exempt from or specifically taxed in lieu of GPTA as amended by 1999 PA 123 because of the severance tax act of 1929?

Within four years of the discovery of the first commercial field in Saginaw, Michigan, in 1925, the Legislature passed the severance tax act of 1929, MCL 205.301 et seq, governing the taxation of oil and gas. Sec. 15 states it was in lieu of any other tax on interests, real and personal (except named pieces of equipment) related to oil and gas.

First we emphasize this case is not about oil and gas which is owned by the surface owner as part of his/her fee. This case is about the owner of the oil and gas

holding separate and apart from the owner of the subdivided lot the surface owner who is assessed and taxed under the GPTA, as amended.

Background

The first oil well said to be drilled in the United States is attributed to "Colonel Drake" while conducting operations in Oil Creek, Pennsylvania on August 28, 1859.[7]

Problems arose involving the rights of landowners in oil and gas because of its physical characteristics and the general lack of knowledge about the subsurface structures in which they are found.

> From the early opinions, it is apparent that it was believed that oil and gas were migratory in the sense that they flowed in underground streams or were otherwise capable of lateral migration even when there had been no artificial interference with the structures containing them. Such substances might be under one tract of land today but under another tract tomorrow. (Citing United States, Arkansas, California, Louisiana, Ohio and Pennsylvania cases).[8]

Thirty-five years later, after oil and gas had been produced in at least five states (not Michigan), the United States Supreme Court in *Brown v Spilman*[9] considered the nature of oil and gas rights finding that:

> Petroleum gas and oil are substances of a peculiar character and decisions in ordinary cases of mining, for coal and other minerals which have a fixed status, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land and are part of it, so long as they are on it or in it or subject to its control; but when they escape and go into another land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land,

---

[7] *A Treatise on the Law of Oil and Gas*, Kuntz, Anderson Publishing Co, p 10, vol 1 (1987) (Appellee Pure's Appendix, pgs 23b – 31b)

[8] Kuntz, *id.* p 111.

[9] *Brown v Spilman*, 155 US 665 (1895)

> and taps into a deposit of oil and gas, extending under his neighbor's field, so that it comes into his well, it becomes his property.[10]

Professor Kuntz wrote on the subject of the nature of oil and gas rights at the turn of the century:

> Ownership of land carries with it ownership of or the exclusive right to enjoy substances under the surface, and the state has no proprietary rights by virtue of its status as sovereign. The sovereign has only such preparatory rights as it might have reserved in the land upon patent and might have subsequently acquired. To the extent that there is a notion that society generally should benefit from the exploitation and depletion of natural resources, it is expressed by the imposition of severance taxes and by constitutional or statutory provisions requiring the state to reserve certain mineral rights upon disposing of the public lands.[11]

> Because of the peculiar nature of oil and gas, the rights of the owner of oil and gas rights differs substantially from the rights of the owner of solid minerals. Regardless of the variation of expression in describing the rights of the owner of oil and gas rights, it is clearly recognized that oil and gas in place are objects of ownership in the sense that the owner of the mineral estate has rights in or to the oil and gas which are protected.[12]

Attempts to apply the common law concept of ownership of oil and all substances from the core of the earth to the heavens broke down. The law of capture was an obvious solution.

> According to the law of capture, in general terms, the landowner may capture oil or gas by operations on his land. He owns the substance absolutely once it has been reduced to dominion and control. Before the instant of control, however, the ownership of the substance or the right to capture and control it is subject to the possibility of capture and control by another acting within his own rights as a landowner and producing from a common source of supply. The owner of the drained tract has no legal

---

[10] *Brown v Spilman, supra*, pp 670-671, citing *Brown v Vandergrift*, 80 Pa. St. 147; Westmoreland & C. Nat. Gas Co.'s Appeal (Pa Sup) 18 Atl 724.

[11] Kuntz, *id.*, p 59

[12] Kuntz, *id., p 60*

> remedy but may protect his rights in the oil and gas by drilling on his own tract.[13]

The various courts, all applying the law of capture, came up with different theories of ownership ultimately representing little more than selection of an acceptable method of describing ownership in light of the law of capture.[14]

> Although there have been various efforts to classify the theories of ownership in the categories of "ownership," "nonownership" and "qualified ownership," the theories may be reduced to two fundamental theories of "ownership in place" and "exclusive right to take."[15]

Michigan legislators and courts were not involved in these discussions because there was no oil and gas industry here until 1925 when the Saginaw Prospecting Company drilled a well just north of the Saginaw city limits, on property owned by the city, and found what is generally held to be the first commercial field in the state of Michigan.[16]

It took three years to drill 290 producing wells with gross receipts from crude oil produced in 1927 at about $800,000. No permits were issued nor reports made or required by the state of Michigan until late in 1927 when the Conservation Acts were amended by 1927 PA 337 and, later, 1929 PA 23.

Before the discovery of this field, relatively little real use was made of the product from petroleum seeps and a few wells drilled in Port Huron, St. Clair and Macomb Counties. *The Michigan Geological Survey Report* (Publication 14) published in 1912

---

[13] Kuntz, *id.,* p 112

[14] Kuntz, *id.,* p 65

[15] Kuntz, *id.,* p 65

[16] *Legal History of Conservation of Oil and Gas in Michigan*, by Floyd A. Calvert (Appellee Pure's Appendix, pgs 32b – 47b)

and written by Doctor R. A. Smith, assistant and state geologist (1919 - 1948) refers to scattered wells, with most accounts of gas entering water wells in Southeastern Michigan. It was concluded that more often than not oil and gas were regarded as, at the least a nuisance and at the most a hazard.[17]

There were neither laws, regulations or records for oil and gas before or during the development of the Saginaw Field in 1927.[18]

Even the state refers to 1927 as being the start of state royalties. It was the start of everything.

The state points out that in 1909 the state passed the Public Domain Commission Act, but that related only to the management of the state's principal natural resources inventoried in the Public Domain.[19]

In 1921 statutes relating to public domain, fish and game and forests, geological survey and parks were revised and repealed with the creation of the Department of Conservation, 1921 PA 17, § 5654; CL 1929; 1927 PA 337; and, finally by 1929 PA 15 and 1929 PA 23, to regulate the permitting and record requirements of oil and gas wells. (Emphasis supplied)

---

[17] *Michigan Oil & Gas Story: County by County*, Michigan Oil & Gas News (1991), p A-1 (Appellee Pure's Appendix, pgs 48b – 51b)

[18] *Michigan Oil & Gas Story: County by County*, Michigan Oil & Gas News (1991), p A-3 (Appellee Pure's Appendix, pgs 48b – 51b)

[19] Calvert, *supra*, p 77

Within a year after the full development of the Saginaw field, in 1929, the legislature enacted a general oil and gas conservation statute based upon the features of laws in a number of older oil and gas states.[20]

For the first time oil and gas were regulated by a supervisor who could correct any condition he considered waste and the statute provided for the filing of permits before a well could be commenced and for reports after a well was drilled.[21]

Within two years after Saginaw field was developed and producing the legislature passed the *Severance Tax On Oil or Gas*, being 1929 PA 48, MCL 205.301 et seq., which places a tax on any oil and gas produced from any well with the severance tax being "in lieu of all taxes, state, or local upon the oil or gas, *property rights attached or inherent in those property rights, upon all leases or the rights to develop and operate any lands in the state for oil and gas, and the property rights attached to or inherent in those rights."* (Emphasis supplied), MCL 205.315 . The machinery used to find and extract oil and gas were specifically not exempt from taxation, nor were any corporations or associations with the property rights exempt from paying franchise or privilege fees under the state corporation laws.

In 1939 the legislature enacted a comprehensive conservation statute giving the Supervisor broader powers,1939 PA 61; [22]

Prior to 1925, neither the Michigan legislature nor courts had reason to control, much less tax, oil and gas.

---

[20] Calvert, *supra*, p 78

[21] Calvert, *supra*, p 79 & 80

[22] Calvert, *supra*, p 80

The state points out that in 1909 Michigan had in place the provisions for the state reserving metallic and non-metallic minerals, coal, oil and gas when land was sold from the "Public Domain." These types of acts were passed by many states at the turn of the century.[23] It was not unusual for these types of acts to cover property and things not even found or known to be in the jurisdiction.

Kuntz, *supra*, notes that it was not easy to classify the states as to which theory of ownership they espoused because forms of expressions vary from case to case and even within the same opinion. Kuntz found that jurisdictions which had nominally adopted the ownership-in-place theory in the 1930's or had demonstrated an inclination to do so included Michigan, citing the case of *Attorney General v Pere Marquette Ry Co.*[24] [25] However that case did not have that issue before it, nor did it mention "ownership-in-place".

The *Attorney General* case involved the state trying to stop a railroad from drilling an oil well within its right-of-way. The state claimed that the drilling of wells was not within the railroad's power. The Court held that the railroad owned the land in fee and that so long as the drilling did not interfere with the use of the land for public transportation by a railroad, the well could be drilled.

The only reference to a theory of ownership is found at page 434:

> It is well known that oil and gas are fugitive products and may be carried away by operations on adjacent lands. The plaintiff has the right to stop such drainage, and the only way it can be done is by drilling a well and

---

[23] Kuntz, *supra*, p 60

[24] *Attorney General v Pere Marquette Ry Co*, 263 Mich 431; 248 NW 860 (1933)

[25] Kuntz, *supra*, p 66

> extracting the oil and gas from its own property. Being an absolute owner of the property, the railroad company has a right to deal with its surplus property as freely as an individual, except its operations may not interfere with its railroad business or seriously invade or endanger public rights.

The court recognized the right of the property owner to drill on its land to stop the neighbor from getting all the oil in the pool.

The state in its brief, cites *Attorney General* and *Quinn v Pere Marquette Ry Co*[26] to support its position that oil and gas rights severed from the surface estate pass to the state on foreclosure of liens for ad valorem tax purposes.

We see the *Attorney General case* did not fulfill the state's promise, let's look at *Quinn*. *Quinn* involved a landowner who sued the railroad and others to restrain drilling for oil and gas on their property. Interpretation of the grant to the railroad showed a fee rather than an easement. Having a fee entitled the railroad to drill the well. (Just like the *Attorney General, supra* case) In response to *Quinn's* request for an accounting, the Court said:

> However an accounting would be impracticable, because a common pool cannot be measured and divided by decree. As it does not appear that the mere operation or drilling by the defendant could injure plaintiff's land, there is no reason for the intervention of the court. The equitable procedure would be to accord both plaintiff and defendant the free and equal chance to develop their own lands, leaving to the diligence or the lucky the advantages which are unavoidable fortunes of the business.[27]

Both *Quinn* and the *Attorney General* cases rely upon the "law of capture" and find that the fluids within a common pool are not capable of the common term of "ownership," but the valuable fluids go to the "diligent" or the "lucky" who can gain

---

[26] *Quinn v Pere Marquette Ry Co*, 256 Mich 143; 239 NW 376 (1931)

[27] *Quinn v Pere Marquette Ry Co, supra*, p 153

ownership only by capture. That explains one reason why Michigan chose the severance tax specific to those fluids rather than the GPTA before or after amendment by the Act.

The severed ownership of oil and gas cannot meet the requirement of every ad valorem tax . . . . that the property be capable of appraisal to determine the true cash value for assessment and taxation.

The Michigan Court of Appeals in 1966 handed down the case of *Michigan Consol Gas Company v Muzeck*[28] which was the first Michigan case to address the nature of oil and gas rights in this state leaving aside such terms as "ownership in place," non-ownership, or qualified ownership.

The *MichCon* case involved condemnation of property for underground storage. The Court held, at page 507:

> The only ownership that one can have in unproduced oil and gas is the right, to the exclusion of all others, to reduce the same to possession and thereby acquire title thereto. This fundamental precept of oil and gas law, commonly known as the "law of capture," is based upon the fugitive nature of oil and gas, and has been uniformly adopted throughout the United States.[29]

Although views differ concerning the character of ownership of oil and gas in the ground, Kuntz finds uniformity in the conclusion that once oil and gas is extracted from

---

[28] *Michigan Consol Gas Company v Muzeck*, 4 Mich App 502; 145 NW2d 266 (1966)

[29] *Michigan Consol Gas Company, id.*, p 507, citing *Attorney General v Pere Marquette R Co,* (1933), 263 Mich 431, 248 NW 860, 94 ALR 520; *Quinn v Pere Marquette R Co,* (1931), 256 Mich 143, 239 NW 376; and *Rich v Doneghey* (1918), 71 OKL 204, 177 p 86, 3 ALR 352

the earth, it becomes tangible personal property and is subject to absolute ownership.[30] That is when the property is taxed in Michigan; it is taxed once by the severance tax, MCL 205.301, et seq. Unlike the surface and the underlying rock where it is found, oil and gas are non-renewable. It should only be taxed once.

When the oil and gas are separately owned from the other rights in land, surface, air, storage, iron ore, it is within the constitutional power given the legislature to chose a specific tax for this property interest based upon its peculiar characteristics. The legislature passed the severance tax act of 1929, MCL 205.301, et seq.

The state points out in its brief that the legislature briefly provided for separate assessment of severed minerals, coal, gas, salt, gypsum, oil, mining or other rights in 1911 PA 51 which directed a separate assessment of those minerals which were to be deducted from the whole value of the lands assessed under the GPTA. This law, 1911 PA 51, repealed just two years later by 1915 PA 119, was unworkable for all minerals mentioned, especially for oil and gas which had not been commercially produced and at that time, their existence and location in the state were unknown except for seeps and shallow private wells.[31]

The state relies on the case of *Curry v Lake Superior Iron Co*[32] to define the rights in oil and gas. No oil and gas rights were affected by *Curry*, because (1) the term oil and gas taxation was never found in the GPTA; (2) the fluid nature of oil and gas rights and the fact that it was not "found" in Michigan at the time of *Curry* did not permit a

---

[30] Kuntz, *supra*, p 67

[31] Calvert, *supra*

[32] *Curry v Lake Superior Iron Co*, 190 Mich 445; 157 NW 19 (1916)

determination of the fair market value of purposes of assessment; and (3) the passing of the oil and gas severance tax (*supra*) settled the question of taxation of those interests.

There was no provision for taxation of oil and gas rights until 1929 except for a statute in 1911 that was repealed two year later attempting to assess and tax solid minerals (iron ore, copper, limestone, oil, gas, etc.) that apparently failed.

Following *Michigan Consolidated Gas Co*[33], the owner of land is entitled to look for, sever and remove oil and gas found beneath the surface.[34]

In Michigan any owner may, by grant, reservation or lease, create rights to the subsurface oil and gas which are separate and distinct from the surface rights. An owner, therefore, has the absolute authority to convey fee title to another while keeping for himself or another the surface estate.[35]

The legislature passed the severance tax act of 1929 as the only practical solution to tax something that cannot be assessed, moves underground, and may or may not be removable from its rock.

The Severance Tax on Oil and Gas

The severance tax act, MCL 205.301, et seq., identifies the interests subject to the severance tax. It states:

MCL 205.301. Severance tax on oil or gas

---

[33] *Michigan Consolidated Gas Co, supra*

[34] *Manufacturers Nat Bank of Detroit v DNR*, 420 Mich 128, 362 NW2d 572 (1984)

[35] *Van Slooten v Larsen*, 410 Mich 21; 299 NW2d 704 (1980); *Keweenaw Ass'n v Friedrichs*, 112 Mich 442, 70 NW 896 (1897)

> Sec. 1. There is hereby levied upon each producer engaged in the business of severing from the soil, oil or gas, a specific tax to be known as the severance tax.
>
> MCL 205.312 (2). "Producer" as used in this act means a person who owns, or is entitled to delivery of a share in kind or a share of the monetary proceeds from the sale of gas or oil as of the time of its production or severance.
>
> MCL 205.315. Severance tax is in lieu of other taxes; exceptions
>
> Sec. 15. The severance tax herein provided for shall be in lieu of all other taxes, state or local, upon *the oil or gas, the property rights attached thereto or inherent therein, or the values created thereby; upon all leases or the rights to develop and operate any lands of this state for oil or gas, the values created thereby and the property rights attached to or inherent therein*: Provided, however, Nothing herein contained shall in anywise exempt the machinery, appliances, pipe lines, tanks and other equipment used in the development or operation of said leases, or used to transmit or transport the said oil or gas: And provided further, That nothing herein contained shall in anywise relieve any corporation or association from the payment of any franchise or privilege taxes required by the provisions of the state corporation laws. (emphasis supplied)

Sec. 15 identifies explicitly the separate real property interests to which the severance tax applies, *in lieu of all other taxes.* The oil and gas, including the property rights attached to it, inherent in it and the value created by it are subject to severance tax in lieu of other taxes. Likewise, all leases or rights to develop and operate lands for oil and gas, including the value created by it and the property rights attached to or inherent in leases are subject to the severance tax in lieu of other taxes.

The state here has again taken the identical legal position it took in numerous cases involving the application of Sec.15 of the severance tax to other specific taxes, such as the income and single business taxes. The courts have consistently rejected the state's position. Each time the courts have held that the words of Sec. 15 mean what they say, the severance tax is in lieu of all other taxes.

In *Bauer v Dep't of Treasury*[36] the court concluded:

> We find this to be a clear and unambiguous statement. When the statute says "in lieu of all other taxes," we can conclude only that it means what it says. The words of a statute are to be taken in the sense in which they will be understood by those who must abide by it.[37]

Pure receives royalty payments from the sale of natural gas produced and sold in Antrim County by Defendants/Appellees' Dominion and Wolverine under Pure leases and Pure pays severance tax on the value of the fluids at the time of sale.

Under the severance tax, the legislature said that the only way oil and gas rights would be taxed was to wait until these liquids were actually found and then tax only the actual amount of oil and gas captured and sold.

This Court has held that the language of Sec. 15 was clear and unambiguous and that royalty payments (to the owner, lessor) are subject to the severance tax and exempt from the Income Tax Act;[38] another court has held that payments of the severance tax are in lieu of the single business tax.[39]

In 1929 when the severance tax act was passed there was no income tax or single business tax. There was the ad valorem tax on real and personal property, the GPTA and the franchise taxes . . . which could affect the owners of oil and gas. Franchise taxes and personal property taxes on oil field equipment were specifically not covered by the exemption of Sec. 15.

Oddly enough, in *Cowen*, the state argued that oil and gas were only exempt from payment of the GPTA , because it was in effect in 1929, but not the single business tax. The court of appeals held the severance tax, in lieu of "all taxes," was clear, and oil and gas were exempt from the single business tax. In this case, Pure agrees with the state's

---

[36] *Bauer v Dep't of Treasury*, 203 Mich App 97, 512 NW2d 42 (1993)

[37] *Bauer v Dep't of Treasury*, *id.*, p 100

[38] *Elenbaas v Dep't of Treasury*, 231 Mich App 801; 585 NW2d 305 (1998)

[39] *Cowen v Dep't of Treasury*, 204 Mich App 428; 516 NW2d 511 (1994)

position in *Cowen*, however, the state now asserts that the severance tax is not in lieu of any tax.

The *Elenbaas* Court held, "It is not just the leaseholds which are subject to the property taxes that are exempt . . ." it is all interests.[40] That position is expressly stated in an amendment to the severance tax act in MCL 205.312(2), in the definition of "Producer", above.

It follows that if Pure's ownership of oil and gas were exempt from assessment and payment of ad valorem taxes, the GPTA as amended by the Act, MCL 211.1 et seq. does not apply.

Question No. 3: Michigan's Dormant Mineral Act changed the common law by making severed oil and gas rights subject to abandonment unless the owner does specific acts within a 20-year period of time. Where the severed oil and gas owner fully performed those acts can his property rights be forfeited to the FGU because the surface owner's land was forfeited for his failure to pay taxes under the GPTA?

In *Van Slooten v Larsen, supra,* the Michigan Supreme Court considered a constitutional challenge to the dormant mineral act, MCL 554.291, et seq., as applied to severed oil and gas interests. That act changed the common law of Michigan and for the first time stated the ownership of oil and gas could be abandoned. It also set out the exclusive means by which the owner of severed mineral rights could keep those rights. The legislature did not include or even mention the loss of oil and gas rights by tax sale of someone else's property, the surface owner's estate. This gives some indication that the legislature recognized that the only provision for taxation of oil and gas rights was by the severance tax, passed over 30 years earlier, which imposed the tax when the fluids were produced and sold. It was in the state's interests to have severed oil and gas owners, whose interests had not been developed for years, be found and their oil and gas developed by someone should the owners never be found.

---

[40] *Elenbaas, id.*, p 307.

However if the severed oil and gas owner fully complied with the dormant mineral act and did not have his/her rights deemed abandoned, it would be strange to have those same rights taken when an unrelated third party failed to pay under the GPTA, as amended.

The County attached the affidavit of an assessor and supervisor of townships with oil and gas development and production, David B. Grimm, to the County's answer to Pure's amended motion for summary disposition. It was uncontested by the state. Grimm said he was familiar with the laws, rules, regulations and guidelines for determining true cash value of property for the level CMAE II classification. He said there was nothing about valuing severed oil and gas rights. He added that assessors do not take into consideration the possible value of the oil and gas reserves in determining the a true cash value. He also noted that the surface owner is the only one responsible for payment of the tax, and that if reserves of oil and gas could be considered with the surface, the owner would be required to pay higher taxes. (Affidavit attached as Exhibit B to Plaintiff's Brief in Response to Defendant Pure Resources L.P.'S Amended Motion For Summary Judgment, 12/11/02)[41]

The state relies on *Rathbun v Michigan*[42] for its statement that the recorded oil and gas rights owned by a person other than the surface owner pass with a tax or auditor's deed of the surface estate after foreclosure and sale even though the oil and gas rights were never assessed, taxed, and the owner never received a tax bill or notice of foreclosure, sale or hearing or redemption rights.

The *Rathbun* case arose out of the state's issuance of a tax homestead certificate which reserved to the state all minerals, oil and gas rights and other stuff. The homestead statute required the state to give "an absolute title in fee" to the land. After

---

[41] Appellee Pure's Appendix, pgs 52b – 54b

[42] *Rathbun v Michigan*, 284 Mich 521, 280 NW 35 (1938)

oil was discovered, the owner claimed the title in the homestead act trumped the statute requiring the state to reserve minerals, coal, oil and gas. That was the only issue before the court.

The *Rathbun* Court stated:

> The state as owner in fee of the land, could sever the estate in fee to the surface from that of fee in the oil and gas underlying the surface. *Krench v State of Michigan*, 277 Mich 168, 179, 180, 269 NW 131, 135. The term 'absolute' as used in the statutory language, 'absolute title . . . in fee' refers to the nature of the title and not to the nature of the property included under such title.[43]

That is, one can have an absolute fee *in each of* the surface, subsurface (storage), metallic or non-metallic minerals, salt ... et cetera, and oil and gas rights. The case does not say that the state gets oil and gas rights in a tax deed as claimed by the state in its brief, the owner of the land gets the absolute fee in whatever the previous owner (in that case, the state) conveyed. *Rathbun* supports the position taken by Pure. When the state acquires an auditor's or tax deed to foreclosed property, it gets what was assessed, taxed and foreclosed. If the defaulting landowner only owned the surface, that is what the purchaser at sale or the state owns.

None of the cases cited by the state involve the rights of the owner of oil and gas. None of the cases involve the nature of the title of the state where taxes are foreclosed and property sold under GPTA, as amended by the Act or its predecessors.

Question No. 4: Do the state defendants have standing to prosecute this appeal?

The County filed its complaint on June 24, 2002. The state and the state Treasurer as well as the Michigan Department of Treasury were named defendants.

---

[43] *Rathbun*, *id.*, p 534

At paragraph 3 the state is identified as the foreclosing governmental unit for approximately 57 counties, but not Antrim County.

Paragraph 4 says the Treasurer was named because of the supervisory control over the Department of Treasury and, at paragraph 5, the Department of Treasury is named because it is the agency for responsibility of enforcement of the Act for 47 other counties.

In COUNT I, the County asserted, at paragraphs 87 and 88 that the Act, MCL 211.78i(5)(e), does not protect any recorded or unrecorded interest of the state of Michigan from being extinguished if the state did not redeem its property within 21 days after entry of judgment and that 21 days had passed without redemption by the state.

The state defendants filed an answer dated July 25, 2002 saying they lacked knowledge of the other parties; that factual allegations requiring a response did not exist; or that the state lacked knowledge or information to form a belief concerning actions taken by the Plaintiff or the general allegations.

The state responded to COUNT I saying that Sec. 7l of the GPTA, MCL 211.7l, exempts public property belonging to the state from taxation. The state did not respond substantially to any of the other counts which do not appear to affect it.

Pure filed a cross-claim against the state on November 15, 2002 alleging that the state appeared to assert title to some of the property of Pure which the County said was forfeited under the GPTA, as amended by the Act and wanted title to its severed oil and gas rights quieted against any claim of the state.

Pure also asked for class certification for all persons holding severed oil and gas rights which are claimed by the state under tax or Auditor's deeds given after foreclosure of the surface owner's interest under the GPTA both before and after the amendment of the Act. Damages were requested in addition to the quiet title.

On April 10, 2003 the Decision and Order regarding Pure's Amended Motion for Summary Disposition was filed. This is the Decision and Order appealed by the state to the Court of Appeals.

Before filing the Decision and Order the trial court entered an Order after Stipulation of all the parties, including the state of Michigan, to sever the Cross-Claim filed by Pure and proceed independently and under a separate caption and case number. That Order was signed March 25, 2003.

On May 12, 2003 the Trial Court entered a final Order granting Pure's Amended Motion for Summary Disposition based on the Decision of April 10, 2003 and clarifying the prior Order that the holding shall read to specifically include oil and gas leasehold interest.

On May 12, 2003 the Trial Court entered another Order that all remaining Counts of Plaintiff's Complaint are dismissed with prejudice except Count XIII which is dismissed without prejudice. The Order went on to say that a *foreclosure under 1999 PA 123 does not foreclose any interest which the state of Michigan may have in the property being foreclosed.* (emphasis supplied)

With these orders, the Trial Court dismissed any and all actions brought by the County against the state and severed the cross-claim of Pure, the only other claim against the state. The severed cross-claim is the pending litigation referred to several times in the state's brief before this Court and reflected in the two decisions and orders the state attached to its appendix.

This Court has instructed in the case of *Lee v the Macomb County Board of Commissioners*[44] that standing is important in Michigan jurisprudence and prevents courts from undertaking tasks assigned to the political branch. That is, it is the role of

---

[44] *Lee v the Macomb County Bd of Com'rs*, 464 Mich 726; 629 NW2d 900 (2001)

courts to provide relief to claimants in individual and class actions who have suffered and will suffer actual harm. It is not the job of the courts to shape institutions of government to comply with the laws and the Constitution.

At the conclusion of the final orders of the Trial Court, there was no case or controversy between the County and the state or the state and any other party to the suit. Once the state had won everything, it did not take any actions permitted by the Court Rules to remain in the litigation. In point of fact, the state urged and stipulated to the judge signing the Order of May 12, 2003 that all remaining counts but one are dismissed with prejudice, and specifically in the last paragraph of the Order, a judgment in favor of the state's position that it could not be taxed, resulting in Count I, the only count making particular allegations against the state being dismissed.

It appears there was nothing left for the state to contest when it filed its appeal of right in the Court of Appeals and its Application to this Court for leave to appeal.

The state seems to be aware of its problem of standing when, in its brief to this Court it relied on the case still pending in the trial court, which is presently in mediation, to assert its real case and controversy.

Question 5: Whether a lessee of mineral rights who has leased the rights from the surface estate owner is (a) entitled to notice in foreclosure proceedings under the GPTA, MCL 211.78k(5)(e), or (b) has a "severed" mineral interest that is unaffected by foreclosure proceedings involving the surface estate?

This Court's question assumes that the lessor at least owns the fee to the surface and the oil and gas within the subsurface formations, i.e., the lease was not given by the owner of severed oil and gas rights. The assumption is also made that all of the property rights of the lessor are subject to the GPTA as amended by the Act.

With those assumptions, the first part of the question asks if the lessee's rights in an oil and gas lease are substantial interests in property as defined by the GPTA, as amended. If they are, then the lessee of the oil and gas are required to be given notice

from an FGU prior to forfeiture of the rights and vesting in the FGU after the lessor has failed to pay taxes under the GPTA as amended.

Pure, like the state, was unable to find any published decisions on this point. In *Republic Bank v Genesee Co Treas*[45] this Court held that the holder of an undischarged mortgage was entitled to notice on the date when the property secured by the mortgage would be forfeited. This Court held that notice received and signed for by an employee of a branch bank was sufficient for due process requirements.

The state cites two unpublished Court of Appeals' cases which suggest that holders of recorded leases are entitled to notice of a tax foreclosure under the Act. We accept that. What we have tells us that the question of "significant property issues" is a fact question.

In the question propounded by this Court, if the lessor's property was in the Upper Peninsula of Michigan which, through 1990, had 19 wells drilled and 19 dry holes, an oil and gas lease given during that period of time would probably not be a "significant property interest."[46]

On the other hand, if the oil and gas lease were given for lands underlying the Lakes of the North resort in Antrim County, which is substantially underlain by three gas fields, it would probably be considered a "significant property interest" because it is located within a developed and developing field.

The oil and gas lease itself would also determine how significant the interest is. If the lessee received the "exclusive" right to explore and develop the property, that would be more valuable and "significant" than an oil and gas lease given on a non-exclusive

---

[45] *Republic Bank v Genesee Co Treas*, 471 Mich 732; 690 NW2d 917 (2005)

[46] *Michigan Oil & Gas Story, County by County,* Michigan Oil and Gas News, 1991, p 204 (Appellee Pure's Appendix, pgs 48b – 51b)

basis, where other oil companies, or perhaps the lessor himself, could drill in competition to the lessee.

Severed oil and gas owners, on the other hand, have the exclusive right to enjoy by development and sale, oil and gas which they own.[47]

The state asserts that an oil and gas lease is subject to foreclosure unless it is exempt from taxation. It goes on to explain that arguably an oil and gas lease is exempt by virtue of Sec. 15 of the severance tax act which clearly applies to leases. The state then asserts that even if exempted the lease can be cancelled where the tax foreclosure cancels the lessor's interest in the oil and gas.

The state ignores or does not accept the fact that all owners of an interest in oil and gas subject to the severance tax, including the owner of the property receiving royalties, is exempt from the GPTA as amended by the Act, MCL 205.312(2). "Producer" are persons who own or are entitled to a share of gas or oil at the time it is produced including royalty owners, MCL 205.312(2);[48]

The conclusion would be that if the Court finds that the severed mineral act of 1929 is not a specific act for oil and gas or an act that makes the taxation of oil and gas an exception to the GPTA, whether it is entitled to notice as being a "significant property interest" is probably a question of fact.

Where the lessor is the owner of severed oil and gas rights, and the lease is exclusive, then the lease itself is not only "significant," it is the total interest in the owner's property and would be considered a term interest in all of the oil and gas owner's rights, the term being the term of the lease, EXCEPT where the lessee

---

[47] Kuntz, *supra*, p 59

[48] *Brown v Shell*, 128 Mich App 111; 339 NW2d 709 (1983); *Lawnichak v Dep't of Treasury*, 214 Mich App 618; 543 NW2d 359 (1995)

unilaterally received the right to terminate the lease at any time (a very common term in oil and gas leases).

Constitutional Issues

The Court of Appeals did not address constitutional issues raised in the trial court and the briefs of the parties. That court affirmed the trial court based on interpretation of the statutes. This Court indirectly raised the question of due process in its questions, stated here as Question 5.

Pure in its Amended Motion for Summary Disposition of November 21, 2002 supported the motion with an affidavit of Glynn P. Broussard, Land Director of Pure who stated that Pure had never received a notice of assessment, tax, forfeiture, foreclosure or right of redemption or hearing of the County's tax proceedings, nor was Pure aware that the state claimed an ownership interest in its oil and gas rights until the County served its complaint in the summer of 2002.

The County in its complaint of June 23, 2002, Counts 3, 4 & 5 admits the Pure was not given notice of the tax proceedings under the GPTA as amended by the Act.

The County also admits in its complaint that Pure held substantial property interests which, if these interests were not assessable, they were not authorized to be taxed under any other law or exempt from the GPTA as amended by the Act, were entitled to notice under the Michigan Supreme Court's ruling in *Dow v Michigan.*[49] Without notice, any passing of title to the County or a purchaser is VOID. *id.*

The trial court based its decision on the severance tax of 1929 being a specific tax under the constitution or an exception to the GPTA, as amended.

The Court of Appeals, on the other hand, held that the plain meaning of the severance tax act of 1929, the dormant mineral act and the GPTA, as amended by the

---

[49] *Dow v Michigan,* 396 Mich 192; 240 NW2d 450 (1976)

Act showed that taxation of oil and gas was an exception to the GPTA. The Court of Appeals expressly said it would construe both tax acts to avoid rendering either of them unconstitutional or making words in either statute mere surplusage or nonsense, as directed in *Ryan v Ore Lake,*[50] citing *Twp of Warren v Raymond.*[51] These cases hold to the view that "appellate courts of this state will not reach constitutional question when the case under consideration can fairly be disposed of on other grounds."[52]

The Court of Appeals affirmed the trial court finding that the severance tax of 1929 was an exception to the GPTA as amended by the Act. The owner of severed oil and gas could not be taxed under the GPTA as amended by the Act. The default in payment of taxes assessed against the surface owner does not forfeit the oil and gas rights owned by another person.

References to *Pure v State of Michigan* Are Improper in This Suit

1. Comments on the state's "facts" and "opinions"

Pure takes strong objection the state's reference to matters which were not part of the record below and not proper to interject in this appeal. They are:

A. The state and amici refer to *Pure v State of Michigan*. That litigation does not involve the County or the other Defendants/Appellees in this litigation. It was specifically removed from this case so the state could file this appeal.

B. The state refers to the *Pure* litigation claiming that a factual record exists in that case. There has been no testimony except depositions taken by *Pure,* requests for admissions, interrogatories and requests to produce. The state then proceeds to use discovery material labeling them "facts" which are not part of this record. The *Pure v*

---

[50] *Ryan v Ore Lake*, 56 Mich App 162, 223 NW2d 637 (1974)

[51] *Twp of Warren v Raymond*, 291 Mich 426, 289 NW2d 201 (1939)

[52] *Booth Newspapers v U of M Board of Regents*, 444 Mich 211, 507 NW2d 422 (1993)

State of Mich was certified after the state filed its appeal of this case. The state's continued reference to matters not in the record or available to this Court or the parties to this appeal is improper and should not be considered.

C. The state attaches to its appendix and criticizes the opinions and orders of the trial court in *Pure case* in denying motions of the state. It is improper to deride a judge's opinion in a matter where discovery is not complete, no interlocutory appeals have been filed and the matter has not been tried. That matter involves a quiet title matter and damages, none of which are before this court.

D. The state says that Sec. 2 of GPTA, as amended by the Act, says all interests in property not expressly exempt are subject to taxation. Actually Sec. 2 sets forth the definition the real property that will be taxed under the Act, MCL 211.2. Taxable property is all lands in the state, all buildings, fixtures and appurtenances except as expressly exempted by law. The Act's definition does not support the state's position that Sec. 2 real property encompasses severed oil and gas rights.

E. The state quotes Sec. 3 of the GPTA as amended by the Act which, in effect, states that the required assessment will be made to the owner, if known, and the occupant, making both the owner or occupant liable for the taxes on the property. Sec. 3 does not mention the owner of airspace, storage rights, ground water or severed oil and gas rights or that the owner of the oil and gas rights will be assessed as required by Sec. 3, MCL 211.3.

F. The state cites *Krench v State*[53] for its major argument that separately owned oil and gas are subject to foreclosure under the GPTA as it existed in 1936. *Krench* involved unoccupied and unimproved lands sold for unpaid taxes and deeded to the state. In 1911 the property, then in the Public Domain, was sold with the mandated reservation of minerals, coal, and oil and gas rights. Years later, after the discovery of

---

[53] *Krench v State*, 277 Mich 168; 269 NW 131 (1936)

commercial oil/gas, the state leased the oil and gas rights. The property owner attacked the validity of the original reservation. The Supreme Court upheld the act requiring the reservation, saying the state had acquired a fee simple absolute to the property by the tax deed. There was no statement in the decision that the unoccupied and unimproved land had the oil and gas rights severed prior to the foreclosure for unpaid taxes and the giving of the tax deed to the state. The state's version of the holding was not an issue.

The state cited *Rathbun v State*[54] for the same proposition as *Krench*. Again, there is no mention that the property sold at tax sale was subject to severed oil and gas rights.

2. Response to Amici Curiae, Michigan United Conservation Clubs, Et Al.

Defendant/Appellee Pure believes the parties to this action have already provided the courts with all the necessary information to decide this case. Pursuant to MCR 7.306(D), this Court has decided it would benefit from amici curiae providing their views. However, under Michigan law amici curiae are only allowed a limited role in the proceedings.

In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae. *City of Grand Rapids v Consumers Power Co.*[55] The role of an amicus curiae is generally limited to the filing of a brief; they may not participate in oral argument except by court order, MCR 7.306(D); MCR 7.212(H)(2). But on such leave being granted it is not the practice to permit the amicus curiae to argue the case or to go further than to file the brief. *City of Grand Rapids, id.*

---

[54] *Rathbun v State, supra,*

[55] *City of Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921)

It is well established in Michigan law that an amicus curiae may not raise new issues in the case.[56] See also *Reynolds v Bureau of State Lottery* [57] (citing MCR 7.212(H)(2) which expressly limits amicus curiae in appellate proceedings to the issues raised by the parties). The parties in the case control the issues, and only those raised by the parties will be considered. *Union Steam Pump, supra*; *Detroit Auto, supra.*

In addition to the specific legal issues before the court, amici curiae are further limited by the facts which are part of the record. That is to say, we are discussing some 100 lots in Antrim Country which the county treasurer wishes to foreclose. All the county treasurer would like to know is what interests in those lots are properly foreclosed under the GPTA, and what notice is required to owners of severed gas and oil rights.

The amici curiae instead would like this Court to expand far beyond the legal and factual issues already presented by the parties. They base their brief largely on their belief that the trial court holding will threaten an undetermined amount of property already foreclosed by the state, as well as the funding of the National Resources Trust Fund ("NRTF"). But these issues are not properly before this Court. This case does not concern the status of property already held by the state through tax foreclosures. Nor does this case concern the funding of the NRTF. This case simply concerns the scope of foreclosure under the current GPTA. All that has been asked is how to conduct a tax foreclosure properly; that is, what interests may be foreclosed and what procedures must be followed. Amici curiae appear to have their eyes on a different case, one currently in mediation. Amici curiae do not belong here; their interest is elsewhere.

---

[56] *Union Steam Pump Sales Co v Deland*, 216 Mich 261, 263; 185 NW 353 (1921); *Detroit Auto Inter-Insurance Exchange v Commissioner of Ins*, 125 Mich App 702, 713; 336 NW2d 860 (1983)

[57] *Reynolds v Bureau of State Lottery*, 240 Mich App 84, 103; 610 NW2d 597 (2000)

3. Response to Amicus Curiae State Bar of Michigan - Real Property Section.

A. The plain language of GPTA, Section 211.78k(5)(e) is clear and unambiguous, the entire subsection 78k(5) refers to the *property foreclosed* which is the surface owner's interest.

The property of Pure was not assessed, taxed, liened or foreclosed. The County attached the affidavit of assessor and supervisor David B. Grimm who stated that no law, rule, regulation or guideline to assessors determining true cash value of property for a level CMAE II classification mentioned anything about valuing severed oil and gas rights.[58] The County admitted these facts in its complaint (6/23/02, paragraphs 122, 123 and 124).

The State Bar says that Section 78k(5)(e) is the only limitation to all real and personal property coming within the GPTA as amended by 1999 PA 123. Those exceptions are visible or recorded easements or rights-of-way, private deed restrictions or restrictions or other governmental interests imposed (under the environmental protection act). The State Bar, in effect, states that the 1999 amendment repealed every act of the legislature which established exceptions and specific taxes in lieu of a general ad valorem tax as permitted by Const, 1963, art IX, § 3.

If the thought process of the State Bar were followed, large metropolitan airports (as well as small and private airports) would have their deeds to the air rights over property placed in question. The deeds to water rights may or may not be valid. The state's policy to unitize gas fields, such as found underneath *Lakes of the North*, Part 617, Unitization, 1994 PA 451, as amended, MCL 324.61701 et seq, could result in hundreds of people being potentially liable for unpaid taxes for the 7,083 subdivided lots

---

[58] Appellee Pure's Appendix, pgs 52b – 54b

in *Lakes of the North* as well as the golf course, clubhouse, lakes which are held in common.

If the State Bar's thinking is adopted, the doctrine of horrible consequences which motivated Sherry Comben, treasurer for the county of Antrim, would occur; she would not be able to give the notices required under the GPTA, as amended, to the unitized owners of interest in the gas fields underlying *Lakes of the North* with a result that potentially hundreds of people would be filing suit against Antrim County for the fair market value of the gas in place, being presently produced and producing in the future, this being the only remedy permitted the owners of interest in the oil and gas rights underlying *Lakes of North*, MCL 211.78l(1). Pure and the Ward Heirs' severed mineral interest have never been the "foreclosed property" or "that property" which vests in fee simple in the FGU under the GPTA, as amended.

Ownership rights in property are not subject to foreclosure if:

(1) The GPTA, as amended, did not authorize such a tax on that type of property or;

(2) The legislature has not imposed an ad valorem tax on those rights, but has imposed another type of tax rather than the general ad valorem tax specific to that property or;

(3) The persons or property are exempt from taxation by applying the GPTA as amended; or

(4) The property in question is not the type of "property" capable as assessment (which is a prerequisite for *ad valorem taxes*), such as the GPTA, as amended.

At page 3 of its brief the State Bar accepts as true the statement that under statutory and common law, oil and gas rights in Michigan have always been assessed as part of the surface estate and foreclosed along with the surface estate when the surface

owner fails to pay taxes. Neither the state nor the State Bar offered citations to support that statement. The State Bar cited *Attorney General v Pere Marquette R Co*[59] which held that a railroad with a grant and fee could drill a well on its property so long as drilling did not interfere with the use of the land for public transportation. Taxing was not involved or even mentioned.

The state cited *Quinn v Pere Marquette R Co*[60] which held that persons could not sue the railroad to stop it from drilling where the railroad owned a fee rather than an easement. Again, no mention of taxes and no accounting because "a common pool cannot be measured and divided by decree."

The state and the State Bar rely on the case of *Curry v Lake Superior Iron Co*,[61] to define rights in oil and gas. *Curry* did not affect oil and gas rights because taxation was never mentioned. Remember that commercial oil and gas had not been "found" in Michigan until about 10 years after *Curry* and the severance tax act of 1929. MCL 205.301 et seq. had not been passed.

As to the common law which the State Bar says it examined, this Court in *Van Slooten v Larson* [62] and *Keweenaw Ass'n v Fredericks,*[63] giving the State Bar a spread of about 83 years of common law, stated that in Michigan any owner may by grant, reservation or lease create rights which are separate and distinct from the surface rights. An owner, therefore, has the absolute authority to convey fee title to another while keeping for himself or another the surface estate.

---

[59] *Attorney General v Pere Marquette R Co, supra*

[60] *Quinn v Pere Marquette R Co, supra*

[61] *Curry v Lake Superior Iron Co, supra*

[62] *Van Slooten v Larsen, supra*

[63] *Keweenaw Ass'n v Fredericks, supra*

A person may have fee simple title to the surface while another has that same fee simple title to the air space and another to rock for gas storage to the subsurface (as well as subsurface oil and gas which was the subject of discussion in *Van Slooten*).

The State Bar may have also noticed that the state relied upon *Rathbun v Michigan, supra,* for the proposition that recorded ownership in severed oil and gas rights will pass with the tax or auditor's deed on foreclosure of the surface estate.

Instead of supporting the state's position, *Rathbun* stated:

> The state as owner in fee of the land could sever the estate into fee to the surface from that of fee in the oil and gas underlying the surface.[64]

The *Rathbun* court went on to state:

> The term "absolute" as used in the statutory language, "absolute title . . . in fee" refers to the nature of the title and not to the nature of the property included under such title.[65]

The *Rathbun* case should at least make the State Bar look again at the common law of Michigan and the statutory law governing the GPTA as it existed in 1938.

At this point in the brief it should be pointed out that the State Bar did not make an accurate reference to the common or statutory law of Michigan on either the quality and quantity of rights of the owner of a severed oil and gas interest and, just as importantly, the State Bar misinterpreted the present GPTA, as amended, as giving the FGU a greater title than the "fee simple title to the **property foreclosed by the judgment** . . . MCL 211.78k(5)(b). The property foreclosed could only be the property on which there was a lien (that is what foreclosure means). There could only be a lien on property that was assessed with taxes sent to the surface title owner of the lot. Since the severed oil and gas rights in place are incapable of being valuated, and thus assessed, there could be no lien to foreclose.

---

[64] Citing *Krench v State of Michigan*, 277 Mich 168, 179, 180; 269 NW 131, 134 (1936)

[65] *Rathbun, id.*, p 534

B. The State Bar is mistaken in stating that the severance tax act is irrelevant to the payment of real property taxes and that the severance tax is not really "in lieu of all other taxes." The State Bar in this section states that the severance tax act of 1929 only applies to oil and gas which have been severed from real property. They say that by definition the act is irrelevant to payment of ad valorem property taxes.

The State Bar says that the severance tax act levies a tax "upon each producer engaged in the business of severing from the soil oil or gas . ." MCL 205.301. That is correct. In looking at the definition of the term "Producer" in the act, one will see it includes anyone receiving an interest, working interest, royalty, or otherwise pays the tax. That includes the owner of the private oil and gas rights. The State Bar references *Lawnichak v Dep't of Treasury*,[66] stating that the severance tax (not the GPTA, as amended) is a specific tax on persons with an interest in the oil and gas being produced.

That is exactly the type of tax 1963 Const, art IX, § 3 authorized. The legislature could provide for the uniform general ad valorem taxation of real and tangible personal property *not exempt by law*. It then goes on to state that "the legislature may provide for *alternative means* of taxation of designated real and tangible personal property *in lieu of general ad valorem taxation* (Emphasis supplied). It ends stating "Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates."[67]

The severance tax of 1929 meets the criteria of the Constitution. Oil and gas in place or being produced are not capable of being assessed. If not being capable of being assessed, they cannot be taxed. It is not known how much oil and gas will be

---

[66] *Lawnichak v Dep't of Treasury, supra*

[67] 1963 Const, art IX, § 3

produced if found. The solution was to tax oil and gas when and if it is produced and at no other time. That is what the severance tax act of 1929 did.

The definition of the word "Producer" in the severance tax act of 1929 imposes that tax uniformly upon the class or classes to which it operates, i.e., the owners of interest in the oil and gas.

Section 15 of the severance tax act of 1929, specifically states that this tax on oil and gas shall be "in lieu of all other taxes" whether state, county or municipal. The severance tax act itself as well as the Constitution say that this tax is in lieu of the GPTA.

The State Bar states it is clear from the case law concerning the applicability of the severance tax act that the goal is to avoid double taxation. It is clear from the severance tax act and the Constitution, 1963, art IX, § 3 that what was intended was taxation in lieu of the general ad valorem tax on real and personal property. The State Bar cites *Cowen v Dep't of Treasury*[68] to illustrate the point of avoiding double taxation.

However, the state of Michigan in each of the cases involving the severance tax act took the position that the act was not in lieu of the single business tax or the income tax.

In the *Cowen* case the state argued that oil and gas rights were the only property which were exempt from payment of the GPTA. That is in total agreement with the position of Pure.

The State Bar cites the case of *Lawnichak v Dep't of Treas, supra,* for the proposition that the severance tax is a specific tax and not a property tax. It then editorializes that this means the severance tax is a production tax and only applies when the interests are actually produced and converted to goods that can be transported and sold at market. It concludes that this means that severance tax is not applicable and

---

[68] *Cowen v Dep't of Treasury, supra*

can have no effect on ad valorem real property tax, as opposed to ad valorem personal property taxes. This somehow "strips the severance tax act of all relevance to this dispute" because the act does not purport to affect real property taxes.

That is irrational reasoning. It is more reasonable to say that the legislature reached the conclusion that since you cannot value oil and gas in place, it cannot be assessed and therefore cannot be taxed under any form of an ad valorem tax, much less the GPTA as amended. Accordingly, the legislature looked at the Constitution, art IX, § 3 and saw that because they could not determine the true cash value of the property, they would "provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation."

The legislature, knowingly or unknowingly, avoided double taxation of the same property by not taxing it in the ground, but waiting for it to be produced. The *Lawnichak* court held that the severance tax act imposed a specific tax and not a property tax on oil and gas producers, which included Pure. That was the reason for the lawsuit to include the owner of the oil and gas.

The legislature used the same words as are found in the Constitution when it stated, in Section 15, that it was "in lieu of" all other taxes. The Constitution itself says they shall be "in lieu of general ad valorem taxation."

The State Bar faults the severance tax act as being only a specific tax and not a property tax. Here they are correct.

As we have often said in this brief, 1963 Const, art IX, § 3 first provides for what is the GPTA, as amended, to cover real and personal property not exempt by law. It states that the value should be the true cash value and that it will be uniformly assessed, not exceed 50% and provide for equalization.

It is the second part of Section 3 that the State Bar did not discuss. Here the Constitution gave the legislature "alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation.

The legislature did not have to say anything more than what it did in Section 15. It clearly said "in lieu of all other taxes."

The *Lawnichak* case discussed the severance tax act and the expansion of that act to include all owners of any interest, legal or beneficial, in the oil and gas under the term "Producers," MCL 205.312(2).

It would be just illogical following the reasoning of the state and the State Bar to require all of these persons with interest in the severed oil and gas, as well as the hundreds of people who have an interest by the unitization agreement, to lose their rights because the owner of a subdivided lot did not pay taxes assessed under the GPTA.

C. The Dormant Mineral Act is relevant.

The dormant mineral act, MCL 554.291, was an attempt to solve the problem of finding owners of severed oil and gas which had not been addressed or utilized for a number of years. Under common law these rights could not be abandoned. To encourage development or put those rights in the hands of persons who could be found, the legislature specified five or seven acts (depending upon how you look at them) which if performed within a 20-year period would preserve the rights in the record title owner. If not performed, the severed oil and gas rights would be deemed abandoned to the surface owner at the time the 20-year period expired.

The dormant mineral act was passed in 1963, after the severance tax act had already been in effect. The legislature recognized the severed oil and gas as being a substantial right owned distinct and apart from other interests in the land, or there would not have to be a specific provision for abandonment. The severed mineral owner could

not be found in the public documents (except for recorded instruments) which would probably include all the tax records and assessment rolls.

The dormant mineral act does not attempt to override the GPTA, but it is a recognition by the legislature that the record title ownership of severed oil and gas is distinct and apart from the real and tangible personal property referred to by the Constitution, 1963, art IX, § 3 governed by the uniform general ad valorem tax. It is also a statement of how, in Michigan, the owner of those rights can lose them by abandonment if it does not perform specific acts. If the actions enumerated in the Act are performed, the owner of the oil and gas rights (which have no beneficial interest in the other bundle of rights in the real property) is treated differently.

The State Bar's comment concerning the principle of judicial construction, that when two statutes relate to the same subject or share a common purpose they must be read together, is inapplicable.

The two statutes which should be read together are the severance tax of 1929 and the dormant mineral act. Both of those statutes address oil and gas rights. No where in the GPTA, as amended, are rights such as the ownership of air space, the ownership of gas storage rights, the ownership of oil and gas rights or water rights mentioned.

D. The severance tax act of 1929 is not a judicially created exception to the foreclosure statute, it was created by the legislature.

Pure has never argued that the plain language of the GPTA, Sec. 211.78k(5)(e) includes oil and gas rights which have been severed by a recorded instrument. This was fully discussed earlier in this response, however, it was pointed out then and emphasized now that Sec. 78k(5)(e) is just one subsection of Sec. 78k. 78k(1) refers to a petition for foreclosure and a personal visit to the property. Subsection (2) talks about a parcel of property and a person conducting the unpaid delinquent taxes, interest and

penalties. That same subsection discusses property exempt from taxation or a tax not being legally levied. Subsection (5) speaks to describing the property foreclosed by a legal description or street address.

More importantly, 78k(5)(b) speaks of "fee simple title to *property foreclosed by the judgment* vesting in the government and, throughout this section, all the statements relate to the property being foreclosed.

It was undisputed that the severed oil and gas, consisting of 8,000 acres, was not described, evaluated, assessed or taxed at any time. If it was not assessed, there could be no lien. Without a lien there could be no foreclosure, by the very definition of the term "foreclosure." Without foreclosure there could be no vesting of the severed oil and gas rights in the government. The clear and unambiguous reading of Sec. 78k(5) is that it is referring to the property which was foreclosed and no other property.

That is just as clear as Const, 1963, art IX, § 3 giving the legislature power for alternative means of taxation of designated real and tangible personal property "in lieu of general ad valorem taxation."

It is also clear that the legislature, in passing the severance tax of 1929, clearly and unambiguously stated that that tax on oil and gas was, in Sec. 15, "in lieu of all other taxes."

The most interesting argument of the State Bar is found at page 8 of their brief. They use the term judicial legislation, to trigger the Pavlovian response from the Court to reverse the Court of Appeals.

In reading all of the statutes, the most complex words are "assessment," "specific tax," "alternative means of taxation," "in lieu of general ad valorem taxation," and "in lieu of all other taxes." None of those words lack meaning.

E. The fact that foreclosure is an "in rem" action.

The State Bar quotes *International Typographical Union v Macomb County*[69] for the proposition that proceedings *in rem* are suits against the property alone and dispose of the property, rather than the title of any persons. *International Typographical Union* case was a declaratory action to determine the validity of certain bonds.

At page 576 of the opinion the court said:

> In view of our conclusion that the lower court's determination that the decree of the Federal Court was res judicata of plaintiff's rights to relief in the instant case, *we do not deem it necessary to discuss in detail the issue as to whether the proceedings in these two cases are in personam or in rem*.

The court then said, as an aside, that actions to impress liens upon property and to enforce a tax lien against real estate are proceedings in rem.

Again, we are not dealing with a property interest that can be subject to the GPTA, as amended. It cannot be valued, assessed or taxed. Without these there can be no lien to enforce by a "*in rem*" proceeding.

CONCLUSIONS

The very nature of the ownership of oil and gas and the fluids themselves preclude their valuation in place and ability to be assessed for any kind of ad valorem taxes. There is nothing in the Act, nor its predecessor GPTA that mentions the assessment of these rights or substances, but it does go in detail on assessing real property and tangible personal property. The very definition of the real property to be assessed and taxed precludes fitting oil and gas in place within this class.

The enactment of the severance tax on oil or gas within 2 years of completing the first oil field in Michigan, and its unambiguous language validated by the Michigan courts in every attack by the Treasury Department, shows that the legislature intended that oil

---

[69] *International Typographical Union v Macomb County*, 306 Mich 562, 11 NW2d 242 (1943)

and gas rights would only be taxed if and when the oil and gas were actually produced and sold. The proof of the existence of having something of value with the characteristics of oil and gas can only be determined if and when it can be removed and sold.

The state appears to be attempting to appeal aspects of a case pending in the Antrim County circuit court, *Blackstone v State of Mich*, #03-7933-CZ, a quiet title and damage case which is presently in mediation. Two preliminary decisions of the trial court are attached to the state's appendix and referred to in the brief.

RELIEF

That the opinion and order of the trial court and the Court of Appeals be AFFIRMED in all respects or the state's application for leave to appeal be reconsidered and DENIED or HELD until the case the state really wants to appeal is concluded.

Respectfully submitted,

LYNCH, GALLAGHER, LYNCH,
MARTINEAU & HACKETT, P.L.L.C.

By: _____
Mary Ann O'Neil (P49063)
John J. Lynch (P16886)
555 North Main, P.O. Box 446
Mt. Pleasant, Michigan 48804-0446
Telephone: (989) 773-9961

Dated: January 24, 2006